No. 84-1274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, PETITIONER

v.

DIMENSION FINANCIAL CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS AMERICAN FINANCIAL SERVICES ASSOCIATION, *ET AL.*

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Federal Reserve Board exceeded its authority under the Bank Holding Company Act, as amended, when it defined a "bank" as an institution that, among other things, accepts any deposit "with transactional capability that, *as a matter of practice*, is payable on demand," and thereby brought within the statute numerous financial institutions deliberately excluded by the Congress when it amended the law in 1966 to define "bank" as any institution that, among other things, accepts "deposits that the depositor has *a legal right* to withdraw on demand" (emphasis supplied).[1]

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[1] A parallel issue, involving the Board's definition of the term "commercial loan" as part of the definition of "bank" in the BHC Act, is addressed by respondent Dimension Financial Corporation in its brief on the merits.

STATEMENT OF THE CASE

Introductory Statement

The issue presented is whether the Federal Reserve Board (the "Board") lawfully may adopt an expansive definition of "bank" in the Bank Holding Company Act (the "BHC Act" or "Act")—a key term, jurisdictional in function if not in name, already defined by Congress in the statute and periodically narrowed in a series of legislative amendments. Rather than commit the meaning of "bank" to the Board's interpretive discretion, or leave it to the Board to employ "expertise" in fleshing out the statutory scheme, Congress has reserved—and repeatedly exercised—the authority to prescribe the proper meaning of "bank," and hence to determine the scope of the BHC Act.

By its rule-making order at issue here, amending its Regulation Y, the Board has greatly expanded the coverage of the BHC Act. The Board's action has brought within the statute hundreds of longstanding financial institutions, such as industrial loan companies and industrial banks, that never previously were deemed "banks" under the Act, and that Congress purposely excluded from the "bank" definition in the 1966 amendments to the BHC Act. Thus, parent institutions that suddenly have become "bank holding companies" under the BHC Act by virtue of the Board's rule-making order face an onerous choice. They must either (a) divest their "banks," as newly defined, or (b) divest all nonbanking activities forbidden to holding companies under the Act, no matter how lawful and proper such activities were before the Board promulgated its order.

Similarly, institutions suddenly brought under the Act as "banks" by virtue of the Board's expansion of Regulation Y now must divest themselves of either (i) their NOW accounts, never previously deemed "demand" deposits under the Act, or (ii) their "commercial loan" activities, including the purchase of traditional money-market instruments (such as commercial paper and certificates of deposit), never previously deemed "commercial loans." Alternatively, affected institutions must

obtain insurance from the Federal Deposit Insurance Corporation (the "FDIC")— even if, as State-chartered entities, they already have insurance with carriers approved and authorized by applicable State law.

In Section 2(c) of the BHC Act, Congress has defined a "bank" as "any institution . . . which (1) accepts deposits that the depositor has *a legal right* to withdraw on demand, and (2) engages in the business of making commercial loans. . . ." 12 U.S.C. § 1841(c) (1982) (emphasis supplied). By its rule-making order, the Board adopted a regulatory "definition" of the "legal right" prong of the statutory definition:

> "any deposit with transactional capability that, *as a matter of practice,* is payable on demand and that is withdrawable by check, draft, negotiable order of withdrawal, or other similar instrument" (R. 1744) (emphasis supplied).

The Board's definition reaches numerous thrift institutions never previously treated as "banks" under the BHC Act, simply because those institutions offer their customers NOW accounts. These are interest-bearing savings accounts maintained by natural persons and nonprofit corporations, but denied to all commercial entities, from which the account holder has a right of withdrawal by negotiable draft as well as by personal presentation of his passbook at the teller's window. The members of respondent American Financial Services Association and the other respondents that join in this Brief are swept up in the BHC Act's comprehensive regulatory regime by virtue of their NOW account offerings, and they assail that aspect of the Board's regulatory "definition."

Contrary to the Board's assertion (Pet. 3), the financial institutions represented by the respondents joining in this brief are not "largely indistinguishable from banks," and they most certainly are not "fully regulated by the Comptroller of the Currency pursuant to the National Bank Act." Rather, they are, for the most part, State-chartered industrial loan companies,

industrial banks, and industrial loan corporations.[2] These institutions have been in existence for many years before the Board's promulgation of its revised Regulation Y; they were established, and (as to those that are now holding company subsidiaries) acquired by corporate entities in entire good faith, at a time that it was unquestionably lawful to do so.

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[2] The terms "industrial bank," "industrial loan company," and "industrial loan corporation" are interchangeable. *See, e.g., Norfolk Industrial Loan Ass'n* v. *United States*, 70-2 U.S. Tax. Cas. (CCH) ¶ 9,527, at 84,254 (E.D. Va. 1970); Booth, *Industrial Banks as Thrift Institutions*, 1981, at 11 (NCFA Research Services, Jan. 1982).

Respondent American Financial Services Association ("AFSA") is the national trade association of companies engaged in the consumer financing business. It is the nation's largest trade association serving the consumer finance industry. AFSA was organized in 1916, and until 1983 operated as the National Consumer Finance Association. Currently, AFSA represents over 550 companies engaged in the extension of consumer credit through 12,000 offices nationwide. AFSA's member companies serve over 20 million United States households, and have over $100 billion in credits outstanding. Member companies range from single-office, independently owned companies to national organizations that operate hundreds of offices around the country. A roster of member companies has been filed with the Clerk of the Court.

Respondent First Bancorporation is a Utah bank holding company whose application to acquire a Utah industrial loan company triggered the *Beehive* proceeding, described in the text of this brief.

Respondent Household Finance Corporation ("HFC") makes cash loans directly to consumers throughout the United States and elsewhere, including residential equity loans secured by second mortgages on real estate. HFC operates through various institutions throughout the country, including numerous industrial banks and industrial loan corporations chartered in Colorado, Utah, Kansas, and Iowa. HFC is a wholly owned subsidiary of Household International, Inc. ("International"), which, through other subsidiaries, is engaged in various activities—merchandising (such as the ownership and operation of the Vons Grocery chain in southern California, T.G.&Y. stores, and other operations); manufacturing (such as King-Seeley Thermos Company, Schwitzer power components, Eljer plumbing products and other building products, tools, and consumer products); and transportation (including ownership and operation of National Car Rental System, Inc.). These lines of business, which are classified under the BHC Act as nonbanking activities, are impermissible for International if HFC is a "bank holding company" for purposes of the Act.

(footnote continues)

The "demand" deposit prong of the Board's regulatory "definition" has its genesis in the Board's adjudicative order in *First Bancorporation*, 68 Fed. Res. Bull. 253 (1982), and in the subsequent reversal of that order by the United States Court of Appeals for the Tenth Circuit in *First Bancorporation* v. *Board of Governors of the Federal Reserve System*, 728 F.2d 434 (10th Cir. 1984). That proceeding, which is commonly known as the *Beehive* case, provided the precedent on which the court of appeals below relied in setting aside the "demand" deposit prong of the Board's rule-making order here under review. Accordingly, the respondents joining in this Brief will first discuss the *Beehive* case, and then will turn to those aspects of the Regulation Y rule-making proceeding and order that are relevant to the "demand" deposit branch of the present controversy.

The Beehive Proceeding

In February 1979, Respondent First Bancorporation, a Utah company that owns Utah Firstbank (BR 10, 14),[3] applied to the Board for approval under the BHC Act to engage *de novo* in the business of operating an industrial loan company through Foothill Thrift & Loan Company ("Foothill") (BR 268, 272). Under Utah law, Foothill was authorized to operate as an industrial loan company and, in the course of that business, to

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(footnote continued)

Respondent The Colorado Industrial Bank[illegible] Association ("CIBA") is an association of industrial banks chartered in the State of Colorado. CIBA numbers among its membership petitioners Fort Lupton Industrial Bank, Monroe Industrial Bank, Castle Rock Industrial Bank, Ark Valley Industrial Bank, Household Weld County Industrial Bank, Household Lamar Industrial Bank, Household Alamosa Industrial Bank, Household Valley Industrial Bank, and Household Salida Industrial Bank. (The "Household" industrial banks are subsidiaries of respondent HFC.) By virtue of the Board's order here under review, each of these Colorado institutions has become, or is threatened with becoming, a "bank" for purposes of the Act by virtue of its present or future offerings of NOW accounts.

[3] "BR" means the "Beehive Record" of the administrative proceeding before the Board involving First Bancorporation. By separate motion, respondents herein have proposed to lodge a copy of that record with the Clerk of this Court.

issue thrift certificates and thrift passbook certificates, but not to "create any liability due on demand." On April 2, 1979, the Federal Reserve Bank of San Francisco advised that it had no objection to First Bancorporation's commencing the proposed industrial loan activities through Foothill (BR 284).

NOW accounts. On December 31, 1980, the State of Utah's Department of Financial Institutions issued its Regulation No. 2, authorizing Utah industrial loan companies to offer NOW accounts (BR 162). The State of Utah thereby joined a number of other jurisdictions, both State and federal, that have authorized banks and thrift institutions to offer NOW accounts. The regulations promulgated by Utah directed: "All NOW drafts must contain a provision reserving the right of the issuing industrial loan corporation to require 30 days' notice before making payment" (BR 163). In April 1981, in response to Foothill's application, Utah authorized Foothill to offer NOW accounts subject to compliance with applicable State regulations (BR 152).

The Beehive application. In August 1981, First Bancorporation applied to the Board to acquire Beehive Thrift & Loan Company ("Beehive"), another Utah industrial loan company (BR 1). Thereafter, First Bancorporation advised the Board that Beehive would offer NOW accounts in the manner of Foothill, and furnished a description of Foothill's NOW accounts, together with a specimen of a Foothill NOW account draft with its legend reserving the right to require 30 days' prior notice of withdrawal (BR 164; App. A to this Brief).

It merits emphasis that neither the Foothill nor the Beehive application filed by First Bancorporation implicated any issue of interstate banking under the Douglas Amendment. First Bancorporation, as noted, was (and is) a Utah bank holding company; both Foothill and Beehive were Utah industrial loan companies; Foothill offered, and Beehive proposed to offer, NOW accounts in full conformity with governing Utah statutes and regulations. There was no suggestion that either Foothill or Beehive had been created, or their financial activities tailored, to "evade" any provision of the BHC Act or of any other law.

The Board's Beehive ruling. On March 12, 1982, the Board issued an order that in form conditionally approved First Bancorporation's proposed acquisition of Beehive, but in practical effect denied it. The Board conceded that in its Regulation Y as it then stood, the administrative agency already had determined that a bank holding company's operation of an industrial loan company in the manner authorized by State law was a permissible nonbank activity under the BHC Act, "so long as the [acquired] institution does not both accept demand deposits and make commercial loans" (BR 256) (citing 12 C.F.R. § 225.4(a)(2)). The Board did not dispute that Beehive had been, and would continue to be, operated in accordance with Utah law.

However, the Board determined that Beehive's proposed NOW accounts would constitute deposits that the customer has a "legal right" to withdraw on "demand." Accordingly, the Board said, Beehive (once acquired) could not both offer NOW accounts and engage in the business of making commercial loans (BR 258).

In the letter transmitting its decision to First Bancorporation, the Board directed that "in order to comply with" the BHC Act, Foothill, acquired by First Bancorporation with the Board's unconditional permission three years previously, now "should conform" to the p. icies and directives announced for the first time by the Board in its *Beehive* ruling (BR 263). Thereafter, the Board forwarded copies of its *Beehive* decision to various bank holding companies around the country, coupled with a pointed suggestion that the recipients should bring the activities of their subsidiaries offering NOW accounts into conformity with the Board's *Beehive* ruling. *See* 728 F.2d at 435. Thus, the Board effectively treated its *Beehive* ruling as a *de facto*, policy-making rule, immediately applicable to bank holding companies throughout the nation.

On petition for review of the Board's conditional *Beehive* order and its letter directive to First Bancorporation concerning

the NOW-account activities of Foothill, the court of appeals set aside the Board's conditional order:

> "We need look no further than the Act's definition of a 'bank' to resolve this dispute. As the Supreme Court has announced, 'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.' . . . As mentioned, section 2(c) of the Act defines 'bank' as an institution which makes commercial loans and 'accepts deposits that the depositor has *a legal right* to withdraw on demand.' 12 U.S.C. § 1841(c) (emphasis added). Utah law specifically proscribes industrial loan companies from accepting demand deposits, requiring instead that the companies reserve the legal right to demand notice prior to withdrawal. There is therefore no legal right of withdrawal on demand." 728 F.2d at 436 (citations omitted).

Although the Board sought rehearing in the court of appeals (which was denied), and obtained an extension of time within which to apply for a writ of certiorari, no petition for the writ was filed.[4]

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[4] With regard to respondent First Bancorporation, the doctrine of collateral estoppel bars the Board's present effort to relitigate whether NOW accounts are, for purposes of the BHC Act, "demand deposits" when offered pursuant to State law by industrial loan companies chartered in States that do not authorize such companies to offer demand deposits. As this Court recently held, estoppel applies "in a case where the government is litigating the same issue arising under virtually identical facts against the same party," so as to prevent the government "from relitigating the . . . issue" previously decided in favor of the private party. *United States* v. *Stauffer Chemical Co.*, ____ U.S. ____, ____, 104 S. Ct. 575, 580 (1984).

Significantly, the Board has not attempted to identify any "intervening change in the applicable legal context" that might call into question the propriety of issue preclusion as to First Bancorporation. Nor does it appear that any other recognized exception to the general rule of issue preclusion is present here. *See* Restatement, Second, Judgments § 28 (1982).

The Regulation Y Proceeding

On May 19, 1983, while *Beehive* was pending before the court of appeals, the Board announced its intention to revise Regulation Y and invited public comments (R. 203-88). The sole authority advanced by the Board in support of its proposed "demand" deposit definition was its decision in *Beehive* (Pet. App. 21a).

The Board received extensive comment, much of it opposed to the proposed definition of "bank". One or both of the "demand" deposit and "commercial loan" prongs were the subject of adverse commentary from, among others, the Comptroller of the Currency (R. 440), the FDIC (R. 477), and the Federal Reserve Banks of Atlanta (R. 355), San Francisco (R. 312), and Chicago (R. 370). Nonetheless, by rule-making order issued December 29, 1983, the Board adopted its proposed revisions of Regulation Y, unaltered in material part, effective February 6, 1984.

On February 21, 1984, as noted, the court of appeals overturned the Board's adjudicative order in *Beehive*. The Board took no steps either to secure a stay of the *Beehive* ruling or to modify its revised Regulation Y in light of that ruling.

On September 24, 1984, the court of appeals below set aside the Board's "definitions" in the revised Regulation Y. 744 F.2d 1402 (Pet. App. 1a). Concerning the "demand" deposit prong of the Board's rule-making definition, the court adhered to its earlier decision in *Beehive, id.* at 1404 (Pet. App. 4a). The court carefully considered the Board's arguments advanced in support of its proposed definitions, *id.* at 1410 (Pet. App. 18a), and gave due cognizance to the doctrine that "accords deference to regulatory agencies in their implementation of statutory provisions," *id.* at 1410 (Pet. App. 16a).

On February 6, 1985, the Board filed its petition for writ of certiorari, as "authorize[d]" by the Office of the Solicitor General, but without that Office's participation or approval of the merits of the Board's position. On February 14, 1985, the court of appeals denied the Board's motion to stay the mandate. No stay of that order, or of the court of appeals' judgment, was sought in this Court.

Administrative Stays of the Revised Regulation Y

In tacit recognition of the substantial burdens imposed by its order, the Board announced on February 3, 1984, three days before the original effective date of Regulation Y, that upon request it would grant a six-month "grace period," until August 6, 1984, for registration and compliance with the Act—but only to companies that acquired their "banks" prior to December 10, 1982, and that became "bank holding companies" as a result of the Board's order.[5] At the same time, the Board announced that it would exempt from its revised Regulation Y those "companies that, before December 10, 1982, acquired state chartered savings and loan associations, the deposits of which are privately insured under state law, provided that these institutions limit their activities to those permissible for federal thrift institutions under the Home Owners' Loan Act" (R. 1879).

On July 10, 1984, while the judicial review proceeding was pending before the court of appeals, the Board further extended its deadline for registration and compliance under its revised Regulation Y to December 31, 1984. On December 20, 1984, the Board extended indefinitely the date for registration and compliance, this time pending resolution of the legal issues concerning the "bank" definition "by Congress or the courts" (AFSA Br. App. B).

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[5] The date of December 10, 1982 marks the issuance of the Board's Dreyfus letters, to be discussed in the brief of Dimension Financial Corporation. The administrative "grace period" presumably had its origin in the fact, acknowledged by the Board's general counsel in a memorandum to the Board of Governors, that "a number of . . . companies may, prior to the date . . ., have acquired nonbank banks *on the basis of prior Board statements regarding the definition of bank in the Act*" (R. 1446) (emphasis supplied). Although the Board at times hints that its "demand" deposit definition reflects no change in interpretation of the BHC Act, the Board's general counsel, in the same memorandum, told the Board:

> "The proposed definition[ ] of demand deposits . . . would cover a number of institutions, particularly industrial banks and industrial loan companies, that, *until the Board's Beehive . . . action* [ ], were not covered by the Act" (R. 1443-44) (emphasis supplied).

(footnote continues)

SUMMARY OF ARGUMENT

The Board's rule-making redefinition of the "demand" deposit prong of "bank" is contrary to both the plain language of the BHC Act and Congress' stated objective in amending the statutory language in 1966. The Senate Committee report accompanying the 1966 amendments stated that "the bill redefines 'bank' . . . so as to exclude institutions like industrial banks" that offered accounts that "in practice" were payable on demand. Nonetheless, the Board has endeavored to bring back within the coverage of the Act the very institutions that Congress deliberately determined should not be included. The Board's action is particularly egregious where, as here, Congress has reserved to itself—and frequently exercised—the authority to define the key terminology in the statute rather than remit that authority to the Board.

The Board's abrupt declaration that NOW accounts are demand deposits reverses its earlier settled position that NOW accounts are savings deposits. The Board's rule-making action runs counter both to the federal statutes that have authorized the introduction of NOW accounts throughout the country, and to the Board's past administrative actions—its prior decisions under the BHC Act and its key regulations that govern reserve requirements and interest-rate limitations for depository institutions.

The question of a proper "bank" definition, and hence of the proper reach of the BHC Act, is for Congress to decide—not the Board. The Board has conceded this by applying repeatedly to Congress for a legislative remedy. That Congress thus far has declined to respond does not alter the proper allocation of legislative responsibilities, nor does it empower the Board to assume Congress' role.

(footnote continued)

Elsewhere, in its press release accompanying the promulgation of the revised Regulation Y, the Board adverted to its "hardship" procedure for the benefit of companies "that acquired nonbank banks prior to December 10, 1982, on the basis of a narrow interpretation of the commercial loan *or demand deposit* definitions *in effect before that time*" (R. 1627) (emphasis supplied).

ARGUMENT

I. THE BOARD'S REDEFINITION OF "DEMAND" DEPOSITS CONTRAVENES THE LANGUAGE OF THE BANK HOLDING COMPANY ACT AND THE INTENT OF CONGRESS

The Board's admitted purpose in rewriting the statutory definition of "bank" was to enlarge its jurisdiction to reach financial institutions that previously lay beyond the BHC Act. Contrary to the Board's skillfully conveyed suggestion (*see* Pet. Br. 24 & n.17), the vast majority of financial institutions affected by the revised Regulation Y are not the so-called "nonbank banks" newly chartered by the Comptroller of the Currency or applying for charters from the Comptroller. Rather, most of the institutions swept up into the BHC Act as "banks" under the revised Regulation Y are long-existing industrial banks and similar thrift institutions that offer NOW accounts (*see* Pet. App. 32a).

NOW accounts are interest-bearing savings accounts, maintained by natural persons and nonprofit corporations but not by commercial entities, from which the customer may make withdrawals by negotiable draft as well as by personal presentation of his passbook. NOW account customers plainly do not have the *legal right* to withdraw their NOW account deposits on demand. By law, any institution that offers NOW accounts *must* reserve the right to require written notice before the customer withdraws his funds. To overcome this hurdle, the Board simply eliminated the statutory term "legal right" from its regulatory definition of "bank." In so doing, the Board flouted the plain language and unambiguous legislative history of the BHC Act. The Board thereby expanded its regulatory powers to reach industrial banks and similar institutions that Congress deliberately excluded from the BHC Act when it amended the statutory definition of "bank" in 1966.

A. The Board's Revised Definition Contravenes the Plain Meaning of the BHC Act, Inasmuch as NOW Account Holders Do Not Have the "Legal Right" To Make Withdrawals on Demand

There is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Association,* 310 U.S. 534, 543 (1940). Where the words of a statute are unambiguous, this Court repeatedly has required that the "plain meaning" of the statutory language be followed. *See Potomac Electric Power Co.* v. *Director,* 449 U.S. 268, 283-84 (1980); *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 176 (1980); *Diamond v. Chakrabarty,* 447 U.S. 303, 315-18 (1980); *United States v. Oregon,* 366 U.S. 643, 648 (1961); *McDonald v. Thompson,* 305 U.S. 263, 266 (1938).

The "plain meaning" doctrine in statutory construction is no less applicable when the statute in question prescribes a regulatory regime to be implemented by an administrative agency. As this Court said in *Chevron, USA, Inc.* v. *Natural Resources Defense Council, Inc.,* ____U.S.____, ____, 104 S. Ct. 2778, 2781-82 (1984):

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. *First, always, is the question whether Congress has directly spoken to the precise question at issue.* If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." (Footnote omitted) (emphasis supplied).

Added the Court:

> "The judiciary is the final authority on issues of statutory construction and must reject administrative

constructions which are contrary to clear congressional intent." *Id.* at 2782 n.9 (citations omitted).[6]

Here, the language of the BHC Act admits of no ambiguity, either as a general matter or insofar as it relates to NOW accounts. Section 2(c) of the Act defines a bank, *inter alia*, as an institution that "accepts deposits that the depositor has *a legal right* to withdraw on demand" (emphasis supplied). A NOW account customer does not have the "legal right" to withdraw his funds on demand, because the depository institution has reserved its own legal right to require advance notice before permitting the depositor to withdraw his funds.

Long before the Board promulgated its revised Regulation Y, courts and commentators uniformly concluded that where financial institutions reserve the right to require prior notice of withdrawals from accounts, account holders do not have a "legal right" to withdraw their money on demand. As a leading authority on the Act has written, NOW accounts are not "demand" deposits for the purposes of the Act, even if they are, "as a matter of practice, paid on demand"—because "the depository institution is not obliged as a matter of legal right" to pay on demand. P. Heller, *Federal Bank Holding Company Law* 6-7 n.21 (1976).[7]

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[6] As this Court said in *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970):

> "[S]ince the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. . . . 'The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. "[W]here the only or principal dispute relates to the meaning of the statutory term" . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert' " (citations omitted).

[7] *Accord, Pennsylvania Bankers Association* v. *Secretary of Banking*, 481 Pa. 332, 392 A.2d 1319, 1321-22 (1978) (whether or not a bank exercises its right to require notice before paying a NOW draft, "such an instrument is obviously not 'payable on demand' "); *Savings Bank* v. *Bank Commissioner*, 248 Md. 461, 237 A.2d 45, 53 (1968) (notice requirement "negates the assumption that deposits made in accounts subject to withdrawal by check

(footnote continues)

Respondents are aware of no State—and the Board has identified none—where financial institutions offer NOW accounts without reserving the right to require notice prior to withdrawal. *See, e.g.*, Utah Code Ann. 7-1-103(21); Utah Dept. of Financial Institutions Regulation No. 2 (1980); Colorado Rev. Stat. § 11-22-108(1); Ind. Code Ann. § 28-5-1-12 (Supp. 1982); Nebraska Dept. of Banking and Finance Rule 73. Given the longstanding prohibition on the payment of interest on demand deposits, *see* 12 U.S.C. § 371a, the right to require notice of withdrawal is a necessary feature not only of NOW accounts, but of *all* interest-bearing accounts, no matter whether they are accessible by check or other negotiable instrument. *See, e.g.*, 12 C.F.R. §§ 217.1(e) & 329.1(e)(2) (1982).

The Board argues that NOW account customers do have a "legal right" to withdraw their deposits on demand, because they are free to make withdrawals *until* the financial institution actually invokes its right to require notice of withdrawal (Pet. Br. 14-15). In other words, the Board argues, the customer has a "legal right" to withdraw funds from a NOW account until the financial institution exercises its superseding "legal right" to refuse to permit that withdrawal.[8] But a "legal right" exists only where its possessor is entitled to a judicial remedy to enforce it.[9] If a customer had the legal right to withdraw NOW account funds on demand, he could sue an institution that refused to

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(footnote continues)

can be characterized as demand deposits"); Comment, *The Negotiable Order of Withdrawal (NOW) Account*, 14 B.C. Indus. & Com. L. Rev. 471, 486, 487 (1973) (although NOW accounts may "in practice" be paid on demand, they are not demand deposits because the bank retains the authority to require notice prior to withdrawal).

[8] This argument is a *post hoc* concoction of Board counsel, and as such should be summarily dismissed. *See, e.g., Securities Industry Ass'n* v. *Board of Governors*, ____U.S.____, 104 S. Ct. 2979, 2983 (1984) ("it is the administrative official and not appellate counsel who possesses the expertise"). Board counsel first presented the argument in the Board's petition for rehearing in *Beehive*. Thus, the argument did not surface until long after the Board had promulgated its revised Regulation Y.

[9] 3 W. Blackstone, *Commentaries* *23, *109; *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 162-68 (1803); *see Greek Catholic Congregation* v. *Plummer*, 347 Pa. 351, 32 A.2d 299, 301 (1943); *In re Folwell's Estate*, 68 N.J. Eq. 728, 62 A. 414, 415 (1905).

allow withdrawal. Yet a financial institution is legally entitled to refuse to honor any NOW draft simply by requiring advance notice at the time the NOW draft is presented for payment. In such an instance, the customer cannot bring an action for damages or require the institution to allow him to withdraw his NOW account funds; he has no "legal right" to withdraw his funds on demand.

Equally unconvincing is Board counsel's suggestion that NOW account customers somehow have a "legal right" to withdraw their funds on demand because financial institutions in practice do not invoke their right to require notice of withdrawals (Pet. Br. 32). A legal right is not to be ignored simply because it is rarely invoked in practice. Moreover, as discussed in Section I(B), *infra*, Congress amended the BHC Act in 1966 specifically to overturn the Board's conclusion that a deposit is withdrawable "on demand" if "in practice" an institution does not invoke its legal right to require advance notice of withdrawal. *See also* S. Rep. No. 368, 96th Cong., 1st Sess. 7 (1979) (acknowledging that advance notice of NOW account withdrawals "may not be required in practice").[10]

The Board's present position is further belied by its consistent holdings, prior to its abrupt reversal in *Beehive*, that financial institutions that both offer NOW accounts and make commercial loans are not "banks" under the BHC Act, because NOW accounts are not "demand" deposits. In *First Financial*

[10] The Board does not contend that the right to require notice is invoked any more frequently with passbook savings accounts than with NOW accounts. If the right to require notice were to lose legal significance simply because the right is rarely invoked, traditional passbook savings accounts would be transformed, along with NOW accounts, into "deposits that a depositor has *a legal right* to withdraw on demand"—a result that the Board concedes would be contrary to the BHC Act.

Like NOW accounts, traditional passbook savings accounts are not deposits that customers have a "legal right to withdraw on demand," because financial institutions may require advance notice before permitting a savings account customer to withdraw his funds. Accordingly, the statutory ban on paying interest on demand deposits does not apply to savings accounts, even though in practice a savings account customer may withdraw his money on demand.

Group of New Hampshire, 66 Fed. Res. Bull. 594 (1980), the Board approved a bank holding company's application under Section 4(c)(8) of the Act to acquire a guaranty savings bank that would offer NOW accounts and invest in commercial mortgages. Concluded the Board: "Guaranty savings banks . . . are not banks within the meaning of the [BHC] Act since they *do not accept demand deposits* and engage in the business of making commercial loans." 66 Fed. Res. Bull. at 596 (emphasis supplied). Additionally, the applications approved in two cases involving Heritage Banks, Inc., revealed that the guaranty savings banks to be operated already accepted NOW accounts; yet in each case the Board's order approving the application also authorized the guaranty savings bank to make commercial loans. *Heritage Banks, Inc.*, 66 Fed. Res. Bull. 590 & 917 (1980). *See also Profile Bankshares, Inc.*, 61 Fed. Res. Bull. 901 (1975).

The "legal right" phraseology of Section 2(c) does not appear in any other definitional provision of the federal banking statutes. It cannot be assumed, as the Board would have it, that the precise terminology employed by Congress in the BHC Act is merely a legislative shorthand for "checking account," or "account accessible by check," or the like. Wherever else Congress has wished to base legislation upon the "checkable" nature of transaction accounts, it has done so in explicit language. For example, in 1968 Congress amended the Home Owners' Loan Act to clarify the authority of federally chartered savings and loan associations to accept savings accounts. The legislation expressly provided that such savings accounts "shall *not* be *subject to check.*" Pub. L. No. 90-448, § 1716(a), 82 Stat. 608 (codified at 12 U.S.C. § 1464(b)) (emphasis supplied).[11]

Thus, far from "incorporat[ing] prior statutory language in [the] new statute," and thereby presumably "incorpo-

[11] Similarly, the remedial legislation reported by the House Banking Committee on June 18, 1985 would define a bank under Section 2(c) of the BHC Act as any institution that, among other things, "accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties . . . ." H.R. 20, 99th Cong., 1st Sess. § 2(a) (1985).

rat[ing] long-standing administrative interpretations of earlier statutory language" (Pet. App. 37a n.20), Congress departed from earlier statutory usage with the "legal right" language in Section 2(c). It thereby signaled that extant administrative interpretations of other federal banking statutes would not govern under the BHC Act.

B. The Board's Revised Definition Defies the Legislative History of the 1966 Amendments to the BHC Act

1. Congress Amended the BHC Act in Order To Overturn the Board's Ruling that the Act Encompassed Institutions Offering Accounts that "In Practice" Are Payable on Demand

The origin of the definition of "bank" in Section 2(c) of the BHC Act confirms that when Congress used the phrase "legal right to withdraw on demand," it meant exactly what it said.

As originally enacted in 1956, the BHC Act defined "bank" as "any national banking association, or any State bank, savings bank, or trust company." Act of May 9, 1956, ch. 240 § 2(c), 70 Stat. 133. Under that definition, the Board issued two controversial rulings in which it applied the Act to industrial banks, like many of the respondents herein. In "Applicability of the Bank Holding Company Act to Industrial Banks," 49 Fed. Res. Bull. 165 (1963), the Board acknowledged that the Act "was directed principally at control of 'commercial' banks," and that " 'industrial banks' . . . were not regarded as being engaged in commercial banking." *Id.* at 166. Nonetheless, the Board ruled, the acquisition of an industrial bank would be subject to the Act if the industrial bank "accepts deposits subject to check or otherwise accepts funds from the public that are, *in actual practice, repaid on demand,* as are demand or savings deposits held by commercial banks." *Id.* (emphasis supplied). Two years later, the Board restated its position in "Industrial Banks as 'Banks' under Bank Holding Company Act," 51 Fed. Res. Bull. 1539-40 (1965). There the Board ruled that the Act applied to industrial banks issuing investment certificates that were "repaid, *in practice,* on demand." *Id.* at 1540 (emphasis supplied).

Significantly, in light of the Board's present position (Pet. Br. 28), the Board said nothing in the second proceeding about the acceptance of deposits "subject to check." Rather, in both cases, the Board's decision turned on the fact of payment on demand "in actual practice," without regard to the nature of the instrument of withdrawal.

During hearings on proposed amendments to the BHC Act in 1966, witnesses called upon Congress to overturn the Board's application of the statute to industrial banks. *Hearings on S. 2353, S. 2418, and H.R. 7371 Before a Subcomm. of the Senate Comm. on Banking & Currency,* 89th Cong., 2d Sess. 155-57, 394-95 (the "1966 Senate Hearings"). In response to the testimony, Senator Robertson, Chairman of the Banking and Currency Committee, called on the Board to comment on a proposed amendment that would have excluded industrial banks from the definition of "bank" under the Act. The Board responded:

> "The Board believes that the definition should be amended to cover only 'an institution that receives deposits payable on demand,' thereby limiting coverage to commercial banks (*i.e.,* banks that offer checking accounts), and *excluding not only industrial banks but other savings banks that accept funds from the public that are paid on demand.*
>
> "The Board has interpreted the present act as covering industrial banks that accept 'funds from the public that are, *in actual practice, repaid on demand.*' We believe this is the correct legal interpretation of the present statute, *but we see no reason in policy to cover such institutions under this act* . . . .
>
> "Accordingly, we suggest that S. 2353 be amended by striki g lines 6 through 14 on page 3 and inserting in lieu thereof the following:
>
> " '(c) "Bank" means any institution that accepts deposits payable on demand' . . . ." 1966 Senate Hearings, *supra,* at 447 (1966) (April 20, 1966 letter of Board of governors) (emphasis supplied).

Thus, the Board recognized a distinction between (i) deposits that "in practice" are paid on demand and (ii) deposits that are truly "payable on demand." The Board accepted that its past decisions, treating as "banks" any institutions that in practice repaid on demand, were inappropriate as a matter of statutory policy (if not of statutory construction). Further, the Board urged, the BHC Act should be rewritten to define a "bank" as an institution that "accepts deposits payable on demand," thereby excluding any financial institution that required notice before repaying deposits, even if *in practice* the institution permitted withdrawals of such deposits on demand. Significantly, the Board nowhere suggested that the test for "demand" deposits in its proposed legislation should turn on whether the depositor made his demand for repayment by "check" or other negotiable instrument, as opposed to presentation of his passbook or other documentation at the teller's window.

Congress accepted the Board's confession of error, but to guard against administrative relapse, went one step further than the Board had recommended. Far from enacting the Board's proposal "in substance" (Pet. Br. 29), Congress rejected it. Instead, Congress set out to ensure that an industrial bank that in practice repays deposits "on demand" without legal compulsion to do so is not a "bank" covered by the BHC Act. Congress limited the definition of "bank" to "any institution that accepts deposits that the depositor has *a legal right* to withdraw on demand. . . ." Act of July 1, 1966, Pub. L. No. 89-485, 80 Stat. 235 (emphasis supplied). Congress thereby expanded on the Board's concession and overrode the Board's two prior rulings on the subject.

In other words, Congress used the words "legal right to withdraw on demand" in the amended Section 2(c) to exclude institutions that reserve the right to require notice before allowing their customers to withdraw funds, even if *in practice* the institutions permit withdrawals on demand. In so doing, Congress foreclosed the Board from arguing, as it does now, that vague notions of "transactional capability" somehow could transform a nondemand account into an account covered by Section 2(c) of the BHC Act.

2. Congress Intended the BHC Act To Apply Only to Commercial Banks, and Not to Industrial Banks

Congress also made clear in 1966 that the primary intended beneficiaries of the new statutory language in Section 2(c) were to be industrial banks, like respondents herein. The Senate Report accompanying the 1966 amendments to the BHC Act explained that the objective was to ensure that the Act would not cover industrial banks:

> "The purpose of the act was to restrain undue concentration of control of commercial bank credit, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries. *This objective can be achieved without applying the act to savings banks,* and there are at least a few instances in which the reference to 'savings bank' in the present definition *may result in covering companies that control two or more industrial banks. To avoid this result,* the bill redefines 'bank' as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank *so as to exclude institutions like industrial banks* and nondeposit trust companies." S. Rep. No. 1179, 89th Cong., 2d Sess. 7 (1966) (emphasis supplied).

When the bill came to the Senate floor less than a month later, Chairman Robertson made clear that it was not the Committee's intention to convert industrial banks and similarly situated thrift institutions into "banks" on the theory that savings accounts would be magically transformed into deposits payable on demand as a "legal right" simply by use of a "check-like" instrument as a means of access. Said the Chairman:

> "The committee amended the definition of the term 'bank' so that it now covers 'any institution that accepts deposits that the depositor has a legal right to

withdraw on demand.' *This definition clearly excludes industrial banks,* mutual savings banks, and trust companies such as the Hershey Trust Co., which accepts no deposits whatever. *Since these institutions do not receive deposits in the form ordinarily received by commercial banks,* it was considered appropriate to change the definition of banks so they would not be covered by the act, and the committee report makes it clear that this exclusion is based on the fact that, if an institution does not accept demand deposits, it cannot be considered a commercial bank subject to the provisions of the act." 112 Cong. Rec. 12386 (June 6, 1966) (emphasis supplied).

The Board concedes that the 1966 amendments "were designed to exclude from coverage under the Act . . . industrial banks" (Pet. App. 24a; *see also id.* at 42a). Nonetheless, without any intervening legislative change, the Board now has revised Regulation Y in order to expand the coverage of the Act so that it will again include industrial banks.

In the *Beehive* case, the court of appeals properly concluded that the legislative history of the BHC Act compelled rejection of the Board's approach. Said the court:

> "Congress . . . overturned the Board's interpretation by substituting the '*legal right* to withdraw' language for the Board's right to withdraw on demand *in actual practice* provision. That differentiation, in the words of the Senate Banking Committee chairman, 'clearly excludes industrial banks.' No room exists for an argument that a practice as to NOW accounts should prevail rather than the statute." 728 F.2d at 437 (citation omitted) (emphasis in original).

3. The Legislative History Shows that Congress Did Not Define "Bank" in Terms of the Instrument by Which Deposits May Be Withdrawn

The Board now contends that the legislative history of the 1966 amendment somehow supports its revised Regulation Y, on the theory that Congress supposedly considered the use of

check-like instruments of withdrawal to be the litmus test for "banks" under the Act (*see, e.g.,* Pet. 11; Pet. Br. 30). That contention is unsupported by the legislative record. There is no evidence that Congress ever focused on instruments of withdrawal when it redefined the term "bank" to exclude institutions where customers "in practice," but not in law, could withdraw funds on demand. The Congressional objective in amending Section 2(c) in 1966 was not to establish the "check" or "check-like instrument" as the talisman for determining whether an institution is a "bank." Rather, Congress repudiated the Board's earlier decisions that the Act encompassed industrial banks that "in practice" allowed customers to withdraw deposits on demand—decisions that did not turn on the type of instrument used to effect withdrawals, and that swept in passbook and other window withdrawals as well as "checkable" accounts.[12]

Thus, Congress established that an institution reserving the right to require notice before paying *any* instrument of withdrawal—be it check, draft, withdrawal slip, or passbook—could not be deemed a "bank" under the Act. If Congress had intended to base the statutory test in Section 2(c) upon the instrument of withdrawal, rather than on the customer's *legal right* to withdraw on demand, it could have defined "bank" in terms of deposits from which withdrawals may be made by negotiable instrument, as the Board now attempts to do by administrative fiat. Congress did not do so.[13]

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[12] Before Congress, the Board conceded that the 1966 BHC Act amendment would "exclud[e] not only industrial banks but other savings banks that accept funds from the public that are [in practice] paid on demand." 1966 Senate Hearings, *supra,* at 447. At no time during the Congressional hearings in 1966 did the Board suggest that the BHC Act, as amended, would continue to include such institutions if they allowed withdrawals from nondemand accounts by "check-like" instruments.

[13] Certain portions of the legislative history now relied on by the Board suggest that some legislators used the "legal right" and "checking" account phraseology interchangeably. However, read in context, the term "checking" account was used simply as an example of an account fitting the statutory language, not as a substitute for the statutory language.

(footnote continues)

Moreover, the Board's contention that NOW accounts should be viewed as "functionally equivalent" to checking accounts for purposes of the BHC Act ignores important differences between the two categories of deposits—differences that bear directly on the Congressional policies underlying the 1966 amendment to Section 2(c). In that Section, Congress set out to limit the regulatory sweep of the Act even as it expanded the scope of the statute elsewhere. Congress wanted to control the relations among business firms and commercial banks; it did not wish to cast its regulatory net over all financial institutions. That Congressional objective would be thwarted if NOW accounts were viewed as equivalent to checking accounts in the Act's definition of "bank." Traditional checking accounts, which typically cannot be offered by industrial loan companies, constitute one of the most significant relationships between businesses and commercial banks. Such accounts serve as repositories for liquid funds maintained by businesses; they provide interest-free commercial funds for use by banks; they provide businesses with the means of engaging in day-to-day commercial transactions. By contrast, NOW accounts may be maintained only by natural persons and certain nonprofit organizations; commercial businesses may not use them. *See, e.g.,* 12 U.S.C. § 1832(a); Utah D.F.I. Reg. No. 2(BR 162).

Congress' progressive *narrowing* of the "bank" definition is entirely consistent with its simultaneous *expansion* of the substantive restraints fashioned by the amended BHC Act on

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(footnote continued)

The fact that NOW accounts did not exist as such when Congress amended the BHC Act in 1966 does not mean, as the Board argues, that Congress necessarily intended the term "legal right to withdraw on demand" to encompass all accounts subject to check (Pet. Br. 14, 28). In fact, some State financial institutions were offering savings accounts accessible by check in 1966. In Maryland, for example, mutual savings banks had "permitted withdrawals by check since 1869"; yet, because these checkable accounts were subject to a "30 day notice of withdrawal limitation," the accounts were not considered demand deposits. *Savings Bank* v. *Bank Commissioner*, 248 Md. 461, 237 A.2d 45, 52-53 (1968). Thus, when Congress amended the BHC Act in 1966, it cannot be presumed to have intended that all accounts accessible by check would be encompassed by the "legal right" language.

entities deemed "banks" and "bank holding companies" within the reach of the statute. Because of the numerous restrictions imposed by the Act on "bank holding companies"—most notably, the prohibition against engaging in nonbanking activities, except in defined circumstances—Congress confined the definition of affected institutions, so as to ensure that only those entities whose coverage truly was required to effectuate the purposes of the statute would be swept within its coverage.

II. THE BOARD'S ACTION CANNOT BE JUSTIFIED UNDER ITS STATUTORY POWER TO PREVENT "EVASIONS" OF THE ACT

Even though the Board's expanded definition of the term "bank" contravenes the plain language of the BHC Act as well as the Congressional intention underlying that language, the Board seeks to justify its new definition by reference to Section 5(b) of the BHC Act, 12 U.S.C. § 1844(b). That Section authorizes the Board "to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof." According to the Board, industrial banks and other thrift institutions somehow are "evading" the BHC Act by offering NOW accounts rather than traditional checking accounts. Under the Board's theory, the general enforcement authority under Section 5(b) empowers the Board to ignore the statutory language in order to prevent such industrial banks from "evading" the regulatory scope of the Act.

The vast majority of financial institutions adversely affected by the Board's expanded definition of "bank" were not created to take advantage of any "loophole" in the Act. On the contrary, most affected institutions are longstanding industrial banks or similar State-chartered thrift institutions, never previously considered "banks," that began to offer NOW accounts —in accordance with State law—at a time that the Board did not regard NOW accounts as "demand" deposits under the Act. Most of the institutions offering NOW accounts that are affected by the Board's revised Regulation Y have never offered demand checking accounts. It is bizarre for the Board to

suggest that such institutions now are "evading" the Act, simply because they decided, in many cases years ago, to offer NOW accounts in full compliance with applicable law, both State and federal.

More importantly, it is disingenuous for the Board to contend that it may creatively interpret the statutory language under its general power to prevent "evasions" of the statute when the result is to defy Congressional intent and to sweep within the Act's coverage institutions that Congress deliberately *excluded* from the coverage of the Act. As this Court said in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 213-14 (1976):

> "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect *the will of Congress as expressed by the statute*' " (citations omitted) (emphasis supplied).

Under the guise of revising Regulation Y, the Board is attempting again to accomplish what Congress forbade it to do in 1966. The Board contends that to prevent "evasions" of the BHC Act, it must regulate industrial banks offering NOW accounts, because NOW accounts are "in practice" payable on demand. Yet Congress rewrote Section 2(c) in 1966 precisely in order to preclude the Board from regulating industrial banks that offered accounts "in practice" payable on demand. *See* Section I(B), *supra.*

Nor can the Board find justification for its revision of Regulation Y in the court of appeals' decision in *Wilshire Oil Co.* v. *Board of Governors,* 668 F.2d 732 (3d Cir. 1981), *cert. denied,* 457 U.S. 1132 (1982). There an existing bank holding company that owned a commercial bank (Trust Company of New Jersey) caused its bank subsidiary to advise its customers holding noninterest-bearing demand deposits (*i.e.,* traditional checking accounts) that henceforth it would reserve the right to require prior notice of withdrawal, but that it had "no intention of exercising" that right. 668 F.2d at 733-34. By this transparent device, the commercial bank sought to convert its

conventional checking accounts into something other than "demand" deposits, so as to remove itself from the coverage of the BHC Act. The sole purpose of the commercial bank's sham notice requirement was to evade regulation by the Board.

The Court of Appeals for the Third Circuit noted the differences between the commercial bank's checking accounts and NOW accounts. 668 F.2d at 736-37. The court ruled that the commercial bank's sham reservation of a right to require notice of withdrawal on the checking accounts had no effect on its status as a "bank" under the BHC Act. Nowhere did the court suggest that financial institutions such as industrial banks could be brought within the scope of the BHC Act by equating NOW accounts with demand deposits, or that regulation of such institutions was necessary to prevent "evasions" of the BHC Act.[14]

In revising Regulation Y, the Board itself is evading the Act. It is striving to override both the letter and spirit of Section 2(c) by ignoring the statutory purpose behind the 1966 amendment of that Section, and by rewriting the Section to suit its own concept of appropriate banking policy. Congress has determined that the BHC Act should not encompass industrial banks. Congress also has determined that the statutory definition of "bank" should not be triggered by institutions offering

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[14] The Board similarly acknowledged the differences between the checking accounts at issue in *Wilshire* and NOW accounts:

> "The reservation of the right to prior notice has resulted in no change whatsoever in the operation of [Trust Company's] . . . demand deposits. The deposits remain ***non-interest bearing,*** are in fact payable on demand, and are withdrawable by ***business depositors*** by negotiable order." *In re Wilshire Oil Co.,* No. 1114026, slip op. at 18 (April 2, 1981) (emphasis supplied).

In commenting upon the *Wilshire Oil* precedent, the court of appeals correctly said in *Beehive:*

> "The *Wilshire* court 'penetrat[ed] the form of the contracts to the underlying substance of the transaction.' 668 F.2d at 740. No such piercing is possible here as the NOW accounts differ legally as well as in form from demand deposits. The substantive differences include that NOW accounts bear interest, are unavailable to certain depositors, and cannot be subject to a legal right of withdrawal on demand under Utah law." 728 F.2d at 436.

accounts that "in practice," but not in law, are subject to withdrawals on demand. Under these circumstances, the Board is not free to override Congressional language and intent under the guise of preventing "evasions" of the administrative agency's notions of proper statutory objectives.

Even if a revision of Section 2(c) were necessary to deal with changes in the banking industry, it would be the province of Congress, not the Board, to make such statutory changes. Section 5(b) does not transfer legislative authority from Congress to the Board.

III. THE BOARD'S REDEFINITION OF "DEMAND" DEPOSITS IS IN CONFLICT WITH THE FEDERAL STATUTORY POLICIES THAT SANCTION NOW ACCOUNTS AND WITH THE BOARD'S OWN REGULATIONS

A. Federal Statutes Rely on the Reservation of the Right To Require Notice in Order To Distinguish NOW Accounts from Demand Deposits

NOW accounts have been in existence since 1972, when the Supreme Judicial Court of Massachusetts held that State savings banks could permit their customers to withdraw deposits from savings accounts by negotiable order as well as by presentation of a passbook. *Consumer Savings Bank v. Commissioner of Banks*, 282 N.E.2d 416 (Mass. 1972).

Congress initially responded by confining the availability of NOW accounts to Massachusetts and New Hampshire. Act of Aug. 16, 1973, Pub. L. No. 93-100, § 2, 87 Stat. 342. At the same time, Congress authorized federally chartered financial institutions in those States to offer the accounts. *Id.* Congress subsequently extended the NOW "experiment" to the rest of New England,[15] New York,[16] and New Jersey,[17] before permitting NOW accounts nationwide beginning Dec. 31, 1980. Depository Institutions Deregulation and Monetary Control Act

[15] Act of Feb. 27, 1976, Pub. L. No. 94-222, § 2, 90 Stat. 197.

[16] Act of Nov. 10, 1978, Pub. L. No. 95-630, § 1301, 92 Stat. 3641, 3712.

[17] Act of Dec. 28, 1979, Pub. L. No. 96-161, § 106, 93 Stat. 1233, 1235.

of 1980, Pub. L. No. 96-221 (the "Monetary Control Act"), § 303, 94 Stat. 132, 146 (codified, as amended, at 12 U.S.C. § 1832 (1982)).

Congress consistently has recognized the distinction between NOW accounts and demand deposits based on the reserved right to require notice of withdrawal, and has relied upon that distinction in authorizing NOW accounts for depository institutions. The original version of enabling legislation in 1979 would have repealed outright the statutory prohibition on the payment of interest on demand deposits, and would have permitted federally insured thrift institutions to accept demand deposits. Instead, Congress opted for the narrower course of authorizing depository institutions to offer NOW accounts.[18] Congress did not permit interest to be paid on demand deposits, nor did it empower thrifts to accept demand deposits. In so doing, it recognized NOW accounts as a specialized interest-paying savings account, subject to the right to require notice of withdrawal. Said the Senate report accompanying the proposed legislation:

> "Under the definition of a NOW account, a depository institution *may* require a depositor to give 30 days notice before a withdrawal from a NOW account is made, similar to the notice requirement on any savings account, *although such notice may not be required in practice.*" S. Rep. No. 368, 96th Cong., 1st Sess. 7 (1979) (emphasis supplied).

Congress further distinguished NOW accounts from demand deposits by making NOW accounts available only to individuals and certain nonprofit institutions.[19] By contrast, demand accounts not subject to any notice provision generally

[18] Monetary Control Act, § 303, 94 Stat. 132, 146 (codified at 12 U.S.C. § 1832 (1982)).

[19] Monetary Control Act, § 303, 94 Stat. 132, 146 (codified at 12 U.S.C. § 1832 (1982)). NOW accounts are limited to accounts "in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes . . . and with respect to deposits of public funds. . . ." 12 U.S.C. § 1832(a) (1982), as amended by the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 706, 96 Stat. 1469, 1540.

are available through commercial banks to any person, including corporations.

When Congress elected to permit NOW accounts, rather than allow the payment of interest on demand deposits, it did so with full awareness that the reserved right to require notice of withdrawal that distinguishes NOW accounts from demand deposits likely would not be exercised. *See Hearings on H.R. 3864 Before the Subcomm. on Financial Institutions, Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs,* 96th Cong., 1st Sess. 103-04 (1979) (testimony of Charles Partee, Member, Bd. of Governors, Federal Reserve System); *id.* at 153 (statement by Congressman Wylie that the notice requirement "has never been used").

The distinction between checking accounts and NOW accounts also is found in the Federal Deposit Insurance Act.[20] The policy was reaffirmed in 1982, when Congress extended limited demand account powers to thrift institutions that previously had been able to offer only NOW accounts and other savings accounts.[21] There, Congress distinguished the newly authorized demand accounts from the institutions' existing savings accounts, including those subject to negotiable orders of withdrawal, by directing that the latter accounts "be subject to the right of the association to require [at least fourteen days] advance notice" of intended withdrawal.[22]

When Congress has wanted to permit the Federal Reserve Board to treat NOW accounts in the same manner as demand checking accounts, it has done so expressly. The act authorizing NOW accounts nationwide also authorized the Board to set

[20] Insured savings banks, required to hold only time deposits or deposits subject to the right to require notice of withdrawal, 12 U.S.C. § 1813(g) (1982), may offer NOW accounts subject to the notice requirement, *see* 12 C.F.R. § 329.5(c)(4), but not "checking" accounts, *see* 12 U.S.C. § 1813(g) (1982).

[21] Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 312, 96 Stat. 1469, 1496-97 (codified at 12 U.S.C. § 1464(b) (1982)).

[22] *Id.* § 312(1)(C) (codified at 12 U.S.C. § 1464(b)(1)(C) (1982)).

reserve requirements for NOW accounts as well as for demand deposits.[23] There was no suggestion that, absent such express authority from Congress, the Board would have been able to impose reserve requirements on nonmember depository institutions simply because they offered NOW accounts.

B. The Board's Regulations Treat NOW Accounts as Savings Deposits, Not Demand Deposits

For decades, the Board's own regulations have relied upon the notice reservation as the key legal characteristic of savings accounts that causes them not to violate the federal statutory ban on the payment of interest on demand deposits. Since the inception of federal interest rate controls in 1933, the governing law has prohibited the payment of interest on demand deposits. 12 U.S.C. § 371a. If NOW accounts (or other interest-bearing accounts accessible by draft or check) were demand deposits, their offering would violate that statute. However, interest is payable on NOW accounts, *see* 12 U.S.C. § 1832(a), inasmuch as NOW accounts are subject to a reserved right of notice. 12 C.F.R. §§ 217.1(e) & 329.1(e)(2). *Accord,* 12 U.S.C. § 1464(b) (federal savings and loan associations); 12 C.F.R. § 329.2(a) (FDIC prohibition on payment of interest on demand deposits by insured nonmember banks); *see* S. Rep. No. 368, *supra,* at 8; *see also* A. Kaplan, *Federal Legislative and Regulatory Treatment of NOW Accounts,* 91 Banking L.J. 439, 443-44 (1974).

In two of the most important regulatory schemes promulgated and administered by the Board—its Regulations D and Q, which impose, respectively, reserve requirements and interest-rate limitations on deposits in depository institutions, 12 C.F.R. §§ 204, 217—the Board long has distinguished interest-bearing savings accounts from demand deposits by requiring that the former be subject to the reservation of the right of notice of withdrawal, and that such accounts not be offered to commercial customers.

[23] Monetary Control Act, § 103, 94 Stat. 132, 133-38 (codified as amended, in scattered sections of 12 U.S.C.) (empowering Board to impose reserve requirements on "transaction accounts," defined to include both demand deposits and NOW accounts).

In recent years, the Board has amended Regulations D and Q to make provision for NOW accounts. In both regulatory schemes, the Board has declined to classify such accounts as "demand deposits." Regulation D defines a "demand deposit" as

> "a deposit that is payable on demand, or a deposit issued with an original maturity or required notice period of less than seven days, or a deposit representing funds *for which the depository institution does not reserve the right to require at least seven days' written notice of an intended withdrawal.*" 12 C.F.R. § 204.2(b)(1) (emphasis supplied).

Regulation D continues: "The term ['demand deposit'] includes all deposits other than time and savings deposits." *Id.* The Regulation then defines a "savings deposit" as a deposit or account

> "with respect to which the depositor is not required by the deposit contract *but may at any time be required by the depository institution to give written notice of an intended withdrawal not less than seven days before withdrawal is made* . . . ." 12 C.F.R. § 204.2(d)(1) (emphasis supplied).

Regulation Q likewise distinguishes between "demand deposits" and "savings deposits." Section 217.1(e)(2) of Regulation Q defines "savings deposit" in the manner of Regulation D, above, and then classifies NOW accounts as "savings deposits":

> "Deposits subject to negotiable orders of withdrawal may be maintained if such deposits consist of funds in which the entire beneficial interest is held by (A) one or more individuals; (B) a corporation, association, or other organization operated primarily for religious, philanthropic, charitable, educational, fraternal, or other similar purposes and not operated for profit; or (C) the United States, any State of the United States, . . . or any political subdivision thereof." *Id.* § 217.1(e)(3).

In 1973, when Congress first authorized NOW accounts, the Board amended Regulation Q to permit depository institutions in Massachusetts and New Hampshire to offer NOW accounts along with their State-chartered or -insured counterparts. In its public notice of the proposed amendment, the Board explained:

> "The Board proposes to treat the NOW account *as a form of savings deposit.* This would mean that (1) such accounts may be offered only to individuals and certain nonprofit organizations, and (2) withdrawals from such accounts are *subject to the right of the bank to require the depositor to give at least 30 days' notice of any intended withdrawal, although this right need not be exercised.*" 38 Fed. Reg. 26,468 (1973) (emphasis supplied).

Thus, the Board recognized that NOW accounts were to be treated as savings deposits, not demand deposits. Additionally, the Board acknowledged that "the amendment *treats deposits on which NOW's may be drawn as savings deposits* and thereby limits the use of NOW's to individuals and certain non-profit organizations." 38 Fed. Reg. 34,457 (1973) (emphasis supplied). Further, the Board expressly exempted NOW accounts from the provision in Regulation Q that forbids withdrawal of deposits from savings accounts by means of check or other negotiable instrument. *Id.* (promulgating new 12 C.F.R. § 217.5(c)(3)).[24]

In sum, the Board's Regulations D and Q show that NOW accounts do *not* constitute demand deposits because the offering institution reserves the right to require notice prior to

[24] In authorizing nonmember thrift institutions to make use of the Federal Reserve System's draft collection procedures, the Board at one point considered the imposition of a "clearing account" requirement with the Federal Reserve Bank of Boston that would have equalled 3% of the total NOW account deposits in participating institutions. 38 Fed. Reg. 26,469 (1973). The 3% limit equalled the reserve requirement for member banks' *savings* deposits. *See* A. Kaplan, *supra* p. 31, at 450.

withdrawal—without regard to whether the right in fact is invoked.[25]

In still other pronouncements, the Board has made it plain that a financial institution's right to require prior notice is the fundamental distinction between a savings deposit and a deposit that legally may be withdrawn "on demand." As the Board has said in federal court:

> "The critical distinction between demand deposits and savings deposits *has always been that the depositor does not have the legal right to withdraw funds from a savings deposit on demand* and that the bank has a legal right to demand 30 days' notice of withdrawal of such funds." Brief for Appellees at 28, *United States League of Savings Ass'ns* v. *Board of Governors of the Federal Reserve System*, 686 F.2d 953 (D.C. Cir. 1979) (emphasis supplied).

In April 1985, well after the decision of the court of appeals below, Chairman Volcker, in urging the adoption of remedial legislation, told the Congress that "institutions with a bank charter can . . . take all kinds of deposits from the public (including under current court rulings NOW accounts) *other than demand deposits* and make commercial loans without coming under the restrictions of the Bank Holding Company Act." Prepared Statement of Paul A. Volcker, Chairman, Board of Governors, Before the Subcommittee on Financial Institutions, Supervision, and Regulation of the House Committee on Banking, Finance and Urban Affairs, April 17, 1985, at 5

[25] The FDIC also has acknowledged that NOW accounts are offered as a form of savings deposit, subject to the same restrictions and limitations as other savings deposits. *See* 38 Fed. Reg. 34,458 (1973). In its regulations regarding interest on deposits, the FDIC defines savings deposits to include "all interest bearing deposits subject to withdrawal by negotiable or transferrable instruments for the purpose of making transfers to third parties where such withdrawals are authorized by law." 12 C.F.R. § 329.1(e)(2) (1983). "Demand deposits," on the other hand, are defined as all deposits that are not "time deposit[s]" or "savings deposit[s]." 12 C.F.R. § 329.1(a). The Federal Home Loan Bank Board, in its regulations governing the payment of interest, defines a NOW account as "a *savings account* authorized by 12 U.S.C. § 1832 on which interest is paid. . . ." 12 C.F.R. § 526.1(l) (1983) (emphasis supplied).

(emphasis supplied). Thus, Chairman Volcker reiterated the common understanding that NOW accounts are not classified as demand deposits.[26]

IV. THE BOARD'S ACTION CONSTITUTES AN UNLAWFUL EXPANSION OF ITS STATUTORY AUTHORITY

A. Congress Has Manifested Its Intention that It, Rather than the Board, Should Control the "Bank" Definition

In using the term "demand" deposit in the BHC Act, Congress did not use ambiguous words or leave an extensive area of law to be developed by the Board. *Cf. Patagonia Corp.* v. *Board of Governors*, 517 F.2d 803, 813 n.11 (9th Cir. 1975). Rather, the first prong of the "bank" definition is written in precise language. Moreover, the terminology represents a fundamental Congressional limit on the Board's jurisdiction. The Board acknowledges that the bank definition "is the key to the Act" (Pet. App. 20a).

The proper interpretation of the statutory definition of "bank" is not committed to the Board's "expertise." In enacting the "bank" definition in Section 2(c), and subsequently in narrowing the definition by a series of amendments over the years, Congress has not conferred authority on the Board to expand that definition by administrative fiat. The "demand" deposit prong of the "bank" definition does not leave it open to the Board to employ its "expertise" in deciding what institutions should be "banks" under the Act. The Board is not empowered to "interpret" the "legal right" test for demand

[26] Finally, it is noteworthy that the Board's staff, in assessing the impact of NOW accounts, carefully distinguished NOW accounts from "demand deposits" while classifying both of them in the category of "[o]ther checkable deposits." *See* Simpson & Williams, *Recent Revisions in the Money Stock*, 67 Fed. Res. Bull. 539 & n.1, 541, 542 (1981) ("[o]ther checkable deposits consist of *NOW* . . . and ATS (Automatic Transfer Service) *accounts* at commercial banks and thrift institutions, credit union share draft accounts, and *demand deposit accounts* at thrift institutions") (emphasis supplied).

deposits in Section 2(c) in a way that effectively reads it out of the statute.[27]

Each time Congress has amended the definition of "bank" in Section 2(c) of the BHC Act, it has *narrowed* the definition. The BHC Act originally defined a bank as "any national banking association or any State bank, savings bank, or trust company." 70 Stat. 133. In 1966, Congress amended the definition to exclude industrial banks and similar thrift institutions. In 1970, Congress again narrowed the definition, this time by imposing the additional requirement that an institution must be "engage[d] in the business of making commercial loans." And in 1982, as part of the Garn-St Germain Depository Institutions Act, Congress again narrowed the statutory definition, this time by exempting federally insured State-chartered savings and loan associations. Pub. L. No. 97-320, § 333, 96 Stat. 1504.[28]

Congress' allocation of definitional authority under the BHC Act differs altogether from that found in, say, the Federal

[27] *See, e.g., Patagonia Corp.* v. *Board of Governors, supra,* 517 F.2d at 813 n.11 ("Congress did not write the Act in general terms, thus leaving extensive areas of law to be developed by the Board"); *Western Bancshares, Inc.* v. *Board of Governors,* 480 F.2d 749, 752-54 (10th Cir. 1973) (Congress did not give Board a "broad grant" of power to act in the public interest); *see also American Bankers Association* v. *Connell,* 686 F.2d 953, 954 (D.C. Cir. 1979) (Board is not empowered to promulgate regulations that "rewrite the language of statutes which may be antiquated in dealing with the most recent technological advances").

[28] The 1982 amendment does not permit the inference that Congress intended State-insured thrift organizations to become subject to the BHC Act as "banks." The 1982 exemption for federally insured thrifts came about only because the Garn-St Germain Act simultaneously empowered federally insured thrifts, for the first time, to offer conventional demand deposit accounts, *id.,* § 312, 96 Stat. 1496, as well as to make commercial loans at a heightened level of activity, *id.,* § 325, 96 Stat. 1500. As noted above, federally chartered thrifts already were empowered to offer NOW accounts. Thus, the exemptive language added to Section 2(c) of the BHC Act in 1982 was necessitated by the introduction of statutory authority to federally insured thrifts to offer *conventional* checking accounts. *See* S. Rep. No. 536, 97th Cong., 2d Sess. 15 (1982).

Reserve Act, where since 1935 the Board has been expressly authorized

> *"to define the terms used in this section,* to determine what shall be deemed a payment of interest, *to determine what . . . shall be deemed a deposit,* and to prescribe such regulations as it may deem necessary to effectuate the purposes of this section [of the Reserve Act] and to prevent evasions thereof." 12 U.S.C. § 461(a) (emphasis supplied).[29]

In sum, this Court's analysis in *Securities Industry Ass'n* v. *Board of Governors,* ____U.S.____, 104 S. Ct. 2979, 2989 (1984) ("*Bankers Trust*"), applies with equal force here:

> "When Congress has concluded that a particular form of [institution] should be covered by the Act's prohibitions, it has amended the statute accordingly . . . . [W]e find it difficult to imagine that Congress intended the Board to engage in the subtle and ad hoc 'functional analysis' described by the Board."[30]

[29] This is the statutory authority for the Board's promulgation of its Regulation Q, prescribing applicable interest-rate limitations, discussed in Part III(B) of this Brief.

[30] The Board elsewhere has correctly stated the operative principle of statutory construction. In opposing the suggestion that it should disregard the "commercial loan" prong of the "bank" definition in Section 2(c) in order to implement the Congressional policy embodied in the Douglas Amendment, the Board has said:

> "In spite of the definition of 'bank' already provided in section 2(c) of the BHC Act, petitioners attempt to redefine 'bank' for purposes of the Douglas Amendment *and thus in effect read the 1970 Amendment of the bank definition in section 2(c) out of the Act.* It is well-settled, however, *that an agency cannot modify the clear language of a statute . . . . Nor may the Board interpret the Act in a manner which fails to give effect to the Act's definition of bank.* It is clearly established that a statute must be interpreted so as not to render one part inoperative, . . . and that all parts of a statute must be given effect if possible . . . ." Brief for Respondent Board of Governors of the Federal Reserve System at 22-23, *Florida Department of Banking and Finance* v. *Board of Governors,* 760 F.2d 1135 (11th Cir. 1985) (emphasis supplied) (citations deleted).

B. The Board's Policy Concerns Properly Should Be Addressed to Congress, Not the Courts

Faced with the inherent flaws in its legal argument that NOW accounts are encompassed by the statutory term "deposits that the depositor has a legal right to withdraw on demand," the Board seeks refuge in the argument that adherence to the statutory language somehow would do violence to the purposes of the BHC Act. The argument is devoid of support in the record, and cannot withstand close analysis.

According to the Board, the policies underlying the BHC Act "require a separation of banking and commerce" in order to avoid conflicts of interest, undue concentration of resources, and the transmission of unregulated financial risks to the banking system (Pet. Br. 10-11). In the Board's view, the "fundamental objectives of the BHC Act would be substantially undermined" if industrial banks and similar thrift institutions offering NOW accounts are not regulated as "banks" under the Act (*id.* at 12).

The Board's dire predictions may be disposed of summarily. Neither in the administrative proceeding nor in the subsequent review before the court of appeals did the Board advance any factual support for its purported concerns, nor did it point to a single instance in which any abuse has resulted from the fact that thrift institutions offering NOW accounts are not treated as "banks" under the BHC Act. Because the Board has failed to link any of its amorphous concerns to evidence in the record, those concerns should be accorded no weight. *See, e.g., Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983); *U.S. Lines* v. *Federal Maritime Commission*, 584 F.2d 519, 534-35 (D.C. Cir. 1978).

Moreover, an examination of the purported threat posed by NOW accounts to the BHC Act reveals the insubstantiality of the Board's concerns. As the Board recognizes, the fundamental objective of the Act is to prevent abuses that might result if banking and commercial activities become intertwined. The BHC Act prevents such an outcome by subjecting to regulation any institution that *both* (i) accepts true demand deposits, generally available to commercial as well as

individual customers, and (ii) regularly uses such deposits to make loans to businesses. Unlike conventional checking accounts, NOW accounts may *not* be offered generally to business customers; they are available only to individuals and certain nonprofit organizations. Thus, NOW accounts do not provide the access to the commercial deposits that form the critical link in the allocation of bank credit to commercial enterprises.[31]

The Board's suggestion that as a matter of public policy its revision of the "bank" definition is an appropriate response to changes in the activities of industrial banks and other financial institutions, is of course properly addressed to Congress. "[T]his defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress." *Sedima, S.P.R.L.* v. *Imrex Company*, ___U.S.___, ___, 105 S.Ct. 3275, 3287 (1985).

Where developments in the financial services industry have warranted modifications to the statutory definition of "bank," Congress has made appropriate statutory changes in the past. Even now Congress has before it legislation that will address the "bank" definition in light of the Board's concerns. *See* H.R. 20, 99th Cong., 1st Sess. (reported favorably by House Banking Committee, June 18, 1985); S. 736, 99th Cong., 1st Sess. (1985).

The Board suggests that its "bank" definition is intended merely as a stop-gap measure to preserve the *status quo* pending Congressional action (*see, e.g.*, Pet. App. 22a). That argument is unavailing in at least two respects. *First*, as noted above, the Board's administrative action does not preserve the

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[31] The Board also argues that an objective of the BHC Act is to restrict interstate acquisitions of banks. The argument is circular. As the Board has acknowledged, "the interstate banking prohibition in section 3(d) of the BHC Act pertains only to the interstate acquisition of banks and not to the acquisition of nonbank companies . . . ." Brief for Respondent Board of Governors at 17, *Florida Dept. of Banking & Finance* v. *Board of Governors, supra* n.30. In enacting the interstate banking restriction, Congress "expressed no concern . . . about the interstate acquisition of nonbanking firms." *Id.* at 18. Accordingly, no policy underlying the BHC Act is affected by allowing interstate acquisitions of financial institutions that do not meet the statutory definition of "bank."

pending situation, but, so far as industrial loan companies are concerned, entirely disrupts settled relations in the industry. *See* 744 F.2d at 1406 (Pet. App. 4a-5a).

Second, the Board's formal application to Congress for a statutory "moratorium" on the creation and acquisition of "non-bank banks" has failed of enactment. *See* S. 1532, 98th Cong., 1st Sess. (1983); H.R. 3499 & 3536, 98th Cong., 1st Sess. (1983). By itself, the Board's request for a legislative "freeze" amounts to a concession that under the present statute the Board lacks authority to address the subject. In any event, Congress' refusal to act upon the Board's request for interim legislative relief further undermines the Board's authority to act at its own behest. While not dispositive of legislative intent, Congress' refusal to codify—even as a temporary measure—the "bank" definition proffered by the Board is entitled to weight. *Cf. DeCanas* v. *Bica,* 424 U.S. 351, 360 n.9 (1976) ("Congress' failure to enact sanctions reinforces the inference that . . . Congress believes this problem does not yet require uniform national rules").

Here, several factors bolster the conclusion that Congressional inaction evinces an intent that industrial loan companies not be subject to the BHC Act. Specifically, as discussed above, Congress determined 19 years ago that industrial loan companies were not "banks." It tailored the statutory definition to give effect to that determination.

Moreover, through the Board and other sources, Congress has been kept fully apprised of the consequences supposedly flowing from the application of the present "bank" definition. *See, e.g., Moratorium Legislation and Financial Institutions Deregulation: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs on S. 1532, S. 1609 and S. 1682,* 98th Cong., 1st Sess. (1983). Over the course of the last several legislative sessions, Congress has studied the issue. It has heard the Board's arguments about the current trends in the financial services industry and the supposed need to alter the "bank" definition in order to preserve what the Board calls the *"status quo."* Whether Congress has not acted because it approves of current trends, because it does not share the

Board's sense of urgency, or because it is seeking a more comprehensive reworking of the federal banking laws is beside the point here. What matters is that Congress has created a statutory definition, only Congress can change it, and, thus far, Congress has not done so.[32]

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[32] A number of bills addressing the Act's "bank" definition were introduced in the 98th Congress. In addition to various moratoria proposed at the request of the Federal Reserve Board, *see supra* p. 40, more comprehensive bills introduced at the request of the Treasury Department, *see* 129 Cong. Rec. S. 9718 (daily ed. July 12, 1983) (statement of Sen. Garn introducing S. 1609) and of the FDIC, *see* 129 Cong. Rec. S. 10,890 (daily ed. July 26, 1983) (statement of Sen. Garn introducing S. 1682), also proposed reformulations of the "demand" deposit prong, together with various "grandfather" provisions for earlier acquired institutions. *See also* H.R. 3535, 98th Cong., 1st Sess. (1983); H.R. 3537, 98th Cong., 1st Sess. (1983).

None of the bills containing a revised "bank" definition was reported out by the House Committee on Banking, Finance and Urban Affairs. In the Senate, a bill modeled after the Treasury Department's proposed legislation, including the change in the "demand" deposit prong, subsequently was introduced. *See* 129 Cong. Rec. S. 17,031 (daily ed. Nov. 18, 1983) (statement of Sen. Garn introducing S. 2181). After mark-up by the Senate Committee on Banking, Housing and Urban Affairs, a new bill, S. 2851, which also contained revised "demand" deposit language, passed both the Committee and the Senate. *See* 130 Cong. Rec. S. 11,162 (daily ed. Sept. 13, 1984).

As noted, *supra* p. 39, the House Banking Committee at the current session of Congress has reported favorably a bill to amend the "bank" definition. H.R. 20, 99th Cong., 1st Sess.

CONCLUSION

For the foregoing reasons, respondents American Financial Services Association, *et al.* respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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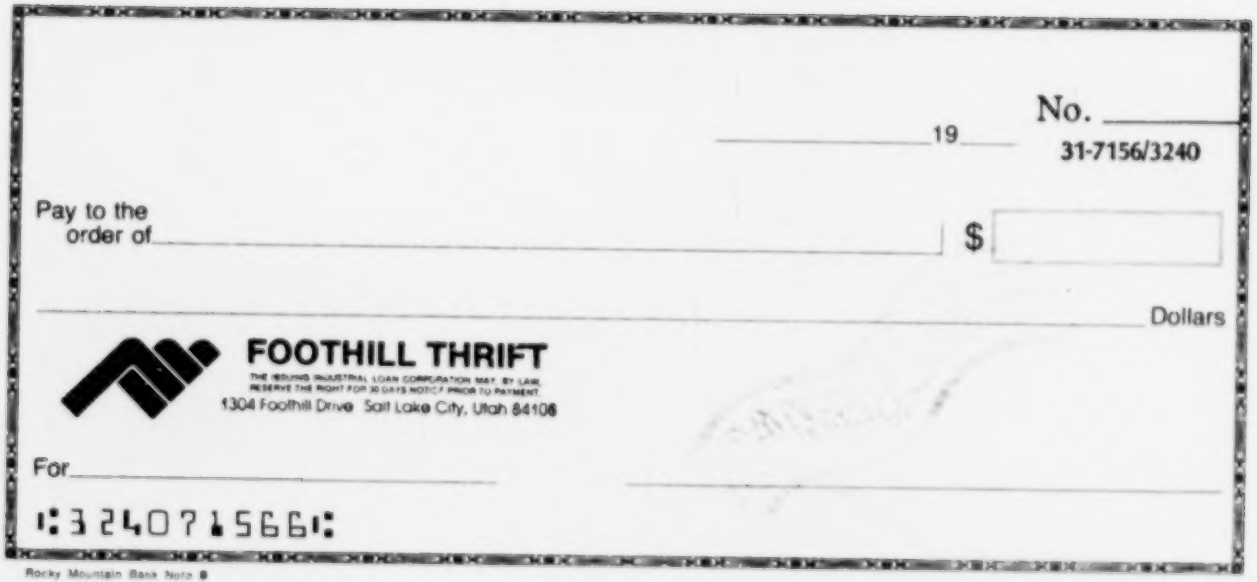
September 11, 1985



No. _____

_____ 19____

31-7156/3240

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_____ Dollars

FOOTHILL THRIFT

THE ISSUING INDUSTRIAL LOAN CORPORATION MAY, BY LAW, RESERVE THE RIGHT FOR 30 DAYS NOTICE PRIOR TO PAYMENT.

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For _____

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Rocky Mountain Bank Note ®

APPENDIX B

[Federal Reserve Press Release Dated December 20, 1984.]

For immediate release

The Federal Reserve Board today announced that it has extended the date for registration by companies that became bank holding companies as a result of the definition of the term "bank" in the Board's revisions to Regulation Y, which became effective on February 6, 1984. The extension will be effective until legal issues regarding the "bank" definition are resolved by Congress or the courts.

The Board similarly extended the grace period for compliance with the Bank Holding Company Act that it granted upon request of certain companies that acquired banks prior to December 10, 1982.

The Board had previously extended the registration date until December 31, 1984. A copy of the Board's order is attached.

Attachment

FEDERAL RESERVE SYSTEM

Order Extending Registration Date for Certain Bank Holding Companies

The Board is hereby extending the date for registration by companies that became bank holding companies as a result of the definition of the term "bank" in the Board's revisions to Regulation Y, which became effective on February 6, 1984. This action is being taken in view of the continued uncertainty of Congressional and judicial action regarding the bank definition. The extension will be effective until legal issues regarding the "bank" definition are resolved by Congress or the courts. The Board similarly is extending the grace period for compliance with the Bank Holding Company Act that it granted upon request of certain companies that acquired banks prior to December 10, 1982.

This action represents a continuation of the Board's previous action on July 10, 1984 extending the registration date until December 31, 1984.

By order of the Board of Governors,[1] effective December 20, 1984.

(signed) WILLIAM W. WILES

William W. Wiles
Secretary of the Board

[SEAL]

[1] Voting for this action: Chairman Volcker and Governors Martin, Wallich, Partee, Rice, Gramley, and Seger.